

# Re Lower

IN THE MATTER OF:

THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY  
ORGANIZATION OF CANADA

AND

SCOTT PHILIP LOWER

2009 IIROC 39

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Pacific District Council)

Heard: August 11, 2009  
Decision: August 12, 2009  
(19 paras.)

## Hearing Panel:

Stephen D. Gill, Chair  
Brian Field  
Bob Sutherland

## Appearances:

Lorne Herlin, for IIROC  
The Respondent was not present and did not appear by counsel.

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## REASONS FOR DECISION

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¶ 1 The Investment Industry Regulatory Organization of Canada (“IIROC”) issued a Notice of Hearing to the Respondent, Scott Philip Lower (“Lower” or the “Respondent”); the Notice of Hearing (Exhibit 1, Tab J) set a hearing date of August 11, 2009. In May, 2009, Mr. Lower was represented by counsel, and his counsel was duly served with the Notice of Hearing on May 22, 2009 (Exhibit 1, Tab J).

¶ 2 The Notice of Hearing alleged Mr. Lower had committed the following contravention:

On or about November 12, 2008, the Respondent refused and/or failed to attend and give information in respect of an IIROC investigation into his conduct while he was an approved person, contrary to IIROC Dealer Member Rules 19.5 and/or 29.1.

¶ 3 Rule 19.5 states:

Investigatory Powers

19.5 For the purpose of any examination or investigation pursuant to this Rule 19, a Dealer Member, registered representative, investment representative, sales manager, branch manager, assistant or co-branch manager, partner, director,

officer, investor or employee of a Dealer Member or any other person approved or seeking approval of under the jurisdiction of the Corporation pursuant to the Rules, may be required by the Corporation:

- (a) To submit a report in writing with regard to any matter involved in any such investigation;
- (b) To produce for inspection and provide copies of any books, records, accounts and documents, that are in the possession or control of the Dealer Member or the person, that the Corporation determines may be relevant to a matter under examination or investigation and such information, books, records and documents shall be provided in such manner and form, including electronically, as may be required by the Corporation; and
- (c) To attend and give information respecting any such matters;

And the person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any person subject to an investigation conducted pursuant to this Rule 19 shall be advised in writing of the matters under investigation and may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion require that any statement given by any person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

¶ 4 Rule 29.1 states:

Dealer Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

¶ 5 As will appear more fully in the facts set forth in the PARTICULARS herein, the Respondent appointed experienced counsel to represent him in this matter, and that counsel had various communications with counsel at IIROC including, in May, 2009, obtaining disclosure of all information in the possession of IIROC pertaining to the Notice. However, on or about June 2, 2009 counsel advised IIROC that he had not been retained to act on behalf of the Respondent with respect to this matter going forward, and specifically that he would not be attending the hearing scheduled for August 11, 2009. This was subsequently confirmed by a further email of August 4, 2009, wherein Respondent's counsel also advised: "Mr. Lower has instructed me to advise you that it is his present intention not to attend." (Exhibit 1, Tabs I, J, K, L, M, and N).

¶ 6 At the hearing, counsel for IIROC provided the Panel with a full description of the background and events leading up to the present hearing, including the absence of Mr. Lower, or counsel on his behalf. This

included an email from IIROC counsel to Mr. Lower on August 5, 2009 enclosing the Affidavit of David M. Zwarich (Exhibit 1) and IIROC’s Bill of Costs (Exhibit 3). No response was received from the Respondent to the email of August 5, 2009.

¶ 7 The Respondent, Mr. Lower, did not file a Response to the Notice of Hearing, as required by Rule 7. Rule 7.2 states:

**7.2 Failure to Serve Response**

- (1) If a Respondent served with a Notice of Hearing fails to serve a Response in accordance with Rule 7.1:
  - (a) the Association may proceed with the hearing of the matter as set out in the Notice of Hearing without further notice to and in the absence of the Respondent; and
  - ((b) the Hearing Panel may accept as proven the facts and violations alleged by the Association in the Notice of Hearing, and may impose penalties and costs pursuant to By-laws 20.33, 20.34 and 20.49.

¶ 8 Further, the Respondent, Mr. Lower, having been served with the Notice of Hearing, failed to attend this disciplinary hearing. Rule 13.5 provides:

**13.5 Where Respondent Fails to Attend Disciplinary Hearing**

- (1) Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Association in the Notice of Hearing.
- (2) Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Association regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant to By-law 20.33 and 20.34.

¶ 9 Counsel for IIROC, having reviewed the facts and circumstances that led to this disciplinary hearing, thereupon reviewed the Rules, By-Laws and a number of relevant authorities. As a result of the Respondent’s failure to serve a Response to the Notice of Hearing, and his failure to attend this disciplinary hearing, pursuant to the Rules, the Panel accepted as proven the facts and violation alleged by IIROC in the Notice of Hearing.

¶ 10 It is appropriate to set forth, in full, the PARTICULARS alleged and proven, as per the Notice of Hearing:

- 1. The Respondent’s registration history is set out in the following table:

Registration Issue Date	Registration Termination Date	Member	Registration Category
November 2001	June 2002	Thomas Kernaghan & Co. Limited	Registered Representative
July 2002	November 2002	Research Capital Corporation	Registered Representative
December 2002	March 2003	IPO Capital Corporation	Registered Representative
July 2003	December 2004	Northern Securities Incorporated	Registered Representative
December 2004	April 2006	Union Securities Limited	Registered Representative

April 2006	December 2006	Wolverton Securities Limited	Registered Representative
January 2007	October 2008	Global Securities Corporation	Registered Representative

2. On June 1, 2008, the Respondent became a regulated person of IIROC.
3. On September 10, 2008, a detective with the Vancouver Police Department (the Detective) swore an Information to Obtain A Production Order (the ITO). In the ITO the Detective, among other things, stated that she had reasonable grounds for suspecting that the Respondent committed offences against the Criminal Code, R.S.C. 1985, c. C-46 (the Criminal Code), namely that between September 27, 2007 and January 17, 2008, the Respondent:
  - i. conspired to give four secret commissions to an agent contrary to sections 426 and 465 of the Criminal Code; and
  - ii. gave three secret commissions to an agent, contrary to section 426 of the Criminal Code.
4. On September 11, 2008, the police arrested the Respondent at the Vancouver head office of Global Securities Corporation (Global Securities). To date, he has not been charged with any offence.
5. On September 11, 2008, following the Respondent's arrest, Global Securities suspended him.
6. By letter dated September 18, 2008, IIROC Staff informed the Respondent that it had commenced an investigation into, among other things, all matters associated with his September 11, 2008 arrest (the Investigation).
7. On September 18, 2008, Global Securities advised IIROC Staff that Global was considering allowing the Respondent to return to work during the week of September 22, 2008.
8. IIROC Staff then contacted the Respondent by telephone and indicated that IIROC Staff would like to talk to him prior to his return to work. Ultimately, the Respondent agreed to meet with IIROC Staff on September 19, 2009.
9. On September 19, 2009, the Respondent met with IIROC Staff. In the course of the interview, IIROC Staff informed the Respondent that since he had not been compelled to attend the interview he was not obligated to stay or to provide information. Pursuant to IIROC Dealer Member Rule 19, IIROC Staff may compel a person who is subject to IIROC's jurisdiction to attend and give information respecting an investigation.
10. In the course of the September 19, 2009 interview, the Respondent refused to answer a number of questions. As a result, following the completion of the September 19, 2009 interview, IIROC Staff provided the Respondent with a letter dated September 19, 2009. The letter, among other things, stated that pursuant to IIROC Dealer Member Rule 19 the Respondent was required to attend at IIROC's Vancouver office on September 22, 2008 in order to provide information in relation to the Investigation.
11. By way of a September 19, 2008 letter, counsel for the Respondent asked that the September 22, 2008 interview be rescheduled because counsel for the Respondent was not available on that day. IIROC Staff agreed to reschedule the interview.
12. On September 23, 2008, Global Securities reinstated the Respondent and he returned to work.
13. On October 22, 2008, IIROC Staff and counsel for the Respondent agreed to conduct the interview on November 3, 2008.

14. By way of an October 27, 2008 letter, IIROC Staff was informed that the Respondent had retained new counsel.
15. On October 28, 2008, the Respondent resigned from Global Securities.
16. By way of a November 3, 2008 telephone conversation, IIROC staff and counsel for the Respondent scheduled the Respondent's interview for November 12, 2008.
17. By way of a November 7, 2008 voice mail message and a subsequent November 7, 2008 letter, counsel for the Respondent informed IIROC Staff that the Respondent would not attend his November 12, 2008 interview.
18. The Respondent did not attend his November 12, 2008 interview.
19. The Respondent's failure to attend his interview and to provide information as required has compromised IIROC Staff's ability to complete the Investigation.

¶ 11 The Facts and circumstances set forth in the PARTICULARS (and in the ITO sworn by the VPD Detective, Exhibit 1, Tab A) set forth facts and circumstances that, if proven, would indicate a serious market manipulation. The Respondent Lower by his deliberate conduct, namely his refusal to comply with Rule 19.5 and attend and give information, totally obstructed and compromised IIROC's ability to properly conduct its investigation into the Respondent's activities, and subverted IIROC's ability to perform its regulatory function.

¶ 12 The Hearing Panel, having accepted as proven that the Respondent had contravened By-law 19.5 as alleged by IIROC in the Notice of Hearing, proceeded to hear submissions on penalty from IIROC counsel.

#### **SANCTIONS SOUGHT AND IMPOSED**

¶ 13 Counsel for IIROC, in his submissions to the Hearing Panel, sought the following sanctions.

- (1) Pursuant to Sections 20.33 and 20.34 of the By-laws:
  - (a) a fine of \$50,000.00.
  - (b) a permanent ban on registration in any capacity of the Respondent; and
  - (c) costs in the amount of \$5,065.00.

¶ 14 In support of its position, IIROC counsel referred to a number of authorities dealing with penalty in circumstances analogous to those in this case, that is, the consequences of the failure to cooperate amounted to serious misconduct. In the majority of those cases the penalty was a \$50,000 fine, imposition of a permanent ban, and an award for costs. The authorities included *Re: Morrison* [2009] IIROC No. 4, a decision of January 16, 2009, and many of the authorities set forth in paragraph 45 of the Morrison decision. Counsel also referred to the Dealer Member Disciplinary Sanction Guidelines, paragraph 5.1 Failure to Cooperate, wherein it states:

Dealer Member Rule 19.5 provides that any person under the jurisdiction of the Corporation is obliged to submit a report in writing with regard to any matter being investigated by the Corporation, to produce for inspection and to provide copies of the books, records and accounts relevant to such an investigation, and to meet and give information respecting the investigation.

Once an examination or investigation is initiated, the Corporation's staff is entitled to free access to any and all records of the Dealer Member or person concerned, who is prohibited from withholding or concealing any documents reasonably required for the purpose of the examination or investigation (Dealer Member Rule 19.6).

Consequently, failure to cooperate / impeding a Corporation investigation, whether by a Dealer Member firm or a registered representative, is serious

misconduct because it subverts the Corporation's ability to perform its regulatory function. This category of misconduct is broad enough to include the following:

- failure to cooperate or respond in a timely manner
- failure to respond truthfully
- failure to cooperate or respond completely

¶ 15 The Disciplinary Sanction Guidelines provide "considerations" in addition to general principals, and counsel for IIROC reviewed each of those points in relation to the Respondent. While the Respondent had no prior disciplinary history, the contravention here was intentional; there was complete non-compliance; the impact of that non-compliance was to completely frustrate and impede the investigation; there is no evidence the Respondent's refusal to cooperate was based on any advice; and lastly, the information requested was of vital significance, and material to the pending investigation. His failure to file a Response, and his failure to attend the hearing demonstrate his ongoing unwillingness to comply.

¶ 16 We also agree with and adopt the comments of the panel in *Re Morrison* at paragraphs 50 and 51:

50. We also agree with, and would reiterate the view expressed in *Re: Stewart*, (*supra* page 8), that the seriousness of the alleged impropriety that forms the basis of the investigation which may have been frustrated in whole or in part by the Respondent's failure to cooperate with the investigative process, can be considered a serious, aggravating factor. In our view that factor is present in this case.

51. The securities industry is a business of trust and confidence. Approved Persons must above all conduct themselves with trustworthiness and integrity, and act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole. Approved Persons have agreed to abide by and comply with the Association's By-laws, and that includes the duty to cooperate in any investigation. As was said in *Re Stewart (supra)*, there is a general principle that the requirement to cooperate in any investigation is fundamental to maintaining an efficient, competitive market environment, and also to maintain the integrity of the securities system and protect the public interest.

¶ 17 IIROC Dealer Member Rule 20.49 provides that in addition to imposing any of the penalties set out in Rule 20.33, 20.34, or 20.45, the hearing panel may assess and order any corporation staff investigation prosecution costs determined to be appropriate and reasonable in the circumstances. IIROC counsel submitted a Bill of Costs (Exhibit 3), which we find to be appropriate and reasonable in the circumstances of this case.

¶ 18 In the result, as we stated at the conclusion of the Disciplinary Hearing, we are satisfied that the sanctions sought by IIROC staff are appropriate, and should be imposed. We therefore impose the following sanctions on the Respondent Lower for the infraction of By-law 19.5:

1. The Respondent pay a fine of \$50,000;
2. A permanent ban on registration in any capacity of the Respondent Scott Philip Lower; and
3. The Respondent pay costs in the amount of \$5,065.

¶ 19 These reasons may be signed in counterpart.

Dated this 12th day of August, 2009.

Stephen D. Gill, Chair

Brian Field, Member

Bob Sutherland, Member

